

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-4192

ORIGINAL

78-6032

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 78-6032

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, et al.,

Appellants,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Appellees.

On Appeal from the Southern District of New York

Docket No. 77-4192

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, et al.,

Petitioners,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petition for Review of Action of EPA

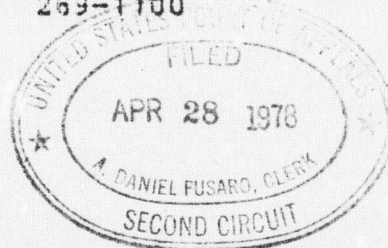
REPLY BRIEF OF APPELLANTS-PETITIONERS,
CENTRAL HUDSON, et al.

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Dated: New York, New York
April 28, 1978

Of Counsel:

G.S. Peter Bergen
Thomas E. Mark



BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 78-6032 and 77-4192

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, et al.,

Appellants-Petitioners,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Appellees-Respondents.

REPLY BRIEF OF APPELLANTS-PETITIONERS,
CENTRAL HUDSON, et al.

Federal Appellees and Intervenor assert as their principal argument that exclusive jurisdiction over the question presented lies in the Court of Appeals' original jurisdiction by reason of §509(b)(1)(D) of the Act. This section states that there may be Court of Appeals review of the EPA Administrator's action "... (D) in making any determination as to a State permit program submitted under Section 402(b)..." Appellees then assert that Utilities' remedy under §509(b)(1)(D) is time-barred, because more than 90 days have passed since November 24, 1975, the date when the Administrator determined "...that the State's authority was adequate to carry out the requirements of the Act..." (40 Fed. Reg. 54462-3 (November 24, 1975), JA250-1)). Being time-barred, the question whether

EPA or NYDEC has jurisdiction is presently unreviewable, according to the Federal Appellees and Intervenor. This argument is wrong.

Utilities have no quarrel with the statement published in the Federal Register that the New York DEC has adequate authority to carry out the permit program (see Utilities' Brief of March 28 at p. 42). Utilities therefore had no justiciable controversy to present in late 1975 or early 1976 under §509(b)(1)(D). If Utilities had then asserted such a claim, it would, no doubt, have been dismissed, perhaps on the basis of an EPA argument that the Memorandum of Agreement was not part of the Administrator's "determination".

EPA and Intervenor now assert, on the other hand, that the Federal Register notice incorporates by reference a "Memorandum of Agreement" between NYDEC and EPA.* EPA next argues that the parties to this Agreement "...agreed that the adjudicatory hearings on permits issued by EPA prior to the transfer date...should be defended by EPA..."

* Failure to publish the Memorandum of Agreement in the Federal Register further supports the conclusion in Utilities' March 28 Brief (pp. 45-47) that the Memorandum of Agreement has no legal force (see Appalachian Power Co. v. EPA, 566 F.2d 451, 10 ERC 1965 (4th Cir. 1977)).

(EPA Brief, pp. 6-7, and pp. 11-12; emphasis added).*

Therefore even assuming arguendo that the Agreement had sufficient legal effect to invoke this Court's jurisdiction under §509(b)(1)(D), the Agreement, by its own terms, would apply only to permits issued by EPA prior to October 1975. Utilities have shown that their permits have not yet been "issued" (see Utilities' Brief at pp. 27-28). Indeed, if this Court were to hold that Utilities' permits had been "issued" in February 1975, Utilities' right to appeal to this Court for review of the terms and conditions in those permits would have expired 90 days thereafter, and neither Utilities nor Intervenor would have a future right to judicial review of the Administrator's final order after the present pending adjudicatory hearings, expected sometime in 1980. Such a result would be absurd.

The key to unraveling this case is interpretation of the word "issued" as used in §402 and §509 of the Act. A permit cannot be "issued" by EPA until after adjudicatory hearings have been completed (§402(a)). The adjudicatory hearings have not been completed. Therefore the contested

* The Agreement says in part:

"Further, all adjudicatory hearings, hearings with respect to §316 of the FWPCA, citizens' suits or other litigation concerning NPDES permits issued by the Regional Administrator prior to the date upon which the Administrator approves the State's permit program will be defended by the Regional Administrator..." (JA 545-6).

conditions of the permits have not been "issued" (see Utilities' Brief at pp. 27-28).^{*} Accordingly, EPA was required by §402(c) to "suspend the issuance" of permits in November 1975, and NYDEC is to take over that task.

EPA admits that its interpretation of "issued" derives from EPA regulations (EPA Brief, p. 23). These regulations were promulgated in July 1974 (see 39 Fed. Reg. 27078 et seq., July 24, 1974). The preamble to these regulations says in part (p. 27078) that:

"If a request for an adjudicatory hearing is granted...the provisions in the proposed permit that are contested shall not be issued and shall not be [final for purposes of review]".

Nonetheless, EPA persists that these regulations mean that a permit is "issued" at the time the Regional Administrator makes his determinations with regard to the permit (see EPA Brief, p. 23). EPA's reasoning in this regard assumes the "public hearing" called for in §402(a) of the Act is a mere "town meeting" legislative-type of

* EPA persists in arguing (EPA Brief, p. 26) that the "opportunity for public hearing" in §402(a) calls for only a legislative hearing. However, three recent Court of Appeals' decisions hold that the "public hearing" must be adjudicative under the APA (see Utilities' Brief, p. 27). EPA further forgets that Con Edison, in a letter of August 27, 1974 to EPA, in fact requested a legislative hearing, but EPA denied the request because it was EPA's policy not to grant legislative hearings where adjudicatory hearings were planned (see Memo of January 29, 1975 to Richard Baker from Barry Cohen of EPA at p. 3, attached as Exhibit A to this Brief).

hearing. In fact such was EPA's interpretation of the term "public hearing" in 1974 and 1975. However, in 1977 three Courts of Appeals unanimously held that the "public hearing" must be an APA type adjudicative hearing. See U.S. Steel v. Train, Marathon Oil Co. v. EPA, and Seacoast Anti-Pollution League v. Costle, cited at p. 27 of Utilities' Brief. These cases plainly show that EPA's regulations were founded on a false legal assumption. Therefore, EPA's interpretation of "issued" is wrong, because its 1974 interpretation of the term "public hearing" was shown to be wrong in 1977.

EPA attempts to escape this conclusion by arguing that the permits have been "issued" (EPA Brief, p. 25) for all purposes other than for purposes of judicial review (EPA Brief, pp. 20-21). However, there is nothing in the Act to suggest even remotely that Congress intended the word "issued" to mean one thing for purposes of §402, and another thing for purposes of §509. Congress stressed that its policy under the Act is to give the State's primary responsibility to implement the permit programs (see Utilities' Brief, p. 23). By giving one word, "issue", two meanings, EPA is contravening Congress' deliberate policy and purpose. EPA may not do this.

As the Supreme Court recently stated:

"The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action" (Vermont Yankee Nuclear Power Corp. v. NRDC, 46 U.S.L.W. 4301, 4311 (April 3, 1978)).

Finally, EPA and Intervenor assert that Utilities' protective petition under §509(b)(1)(D) is time-barred. However, if they were correct that §509(b)(1)(D) was the only available jurisdictional route by which Utilities could seek redress (but see Utilities' Brief, pp. 39-47), such petition would not be time-barred. The petition was filed less than 90 days after OGC 63 was served on Utilities (JA 81-82). OGC 63 was the first time the terms "issuance of permits" and "issued" were ever construed by EPA (see OGC 63 at pp. 4-7 (JA 38-41)).* Since OGC 63 is plainly a new and first interpretation of "issuance" and "issued", OGC 63 is a new ground which arose solely after the first 90 day period had expired. Thus, if this Court were to

* OGC 63 says:

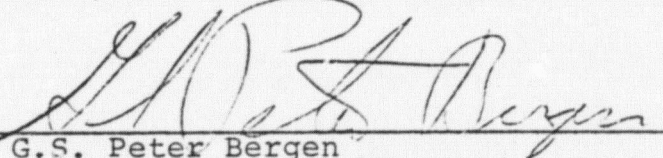
"Neither Section 402(c)(1) nor its legislative history specifies what operative event constitutes 'issuance of permits'. Nor is the term defined...in EPA regulations (JA 38-39) ...I conclude that...'issuance of permits'... should be defined with reference not to the date on which a permit becomes final for purposes of judicial review, but to the date on which the Regional Administrator issues his determination pursuant to 40 CFR §125.35". (JA 40-41)

conclude that its jurisdiction is exclusive under §509(b)
(1)(D), it should also find that the 90 day time period
did not expire under the circumstances.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

By



G.S. Peter Bergen
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Dated: New York, New York
April 28, 1978

Of Counsel:

G.S. Peter Bergen
Thomas E. Mark

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

EXHIBIT A

SUBJECT: Final Permit and Response to Comments re
Con Edison's Indian Point Nuclear Generating Station-
Units 1 and 2 (NY0004472)
FROM: Barry Cohen
Energy and Thermal Wastes Section
Industrial Water Facilities Branch
TO: Richard Baker, Chief
Status of Compliance Branch
Enforcement and Regional Counsel Division

DATE: January 29, 1975

Comments concerning the Draft Permit for the subject plant have been received from:

1. Mr. Carl L. Newman
Consolidated Edison Company of New York, Inc.
4 Irving Place
New York, New York 10003
2. Mr. Thomas E. Quinn, P.E.
Acting Assistant Director
Bureau of Industrial Wastes
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233
3. Mr. Russell T. Norris, Regional Director
U.S. Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Northeast Region
Federal Building-14 Elm Street
Gloucester, Massachusetts 01930
4. Mr. Angus Macbeth
Attorney for Hudson River Fisherman's
Association
National Resources Defense Council, Inc.
15 West 44th Street
New York, N.Y. 10036

Mr. Newman's comments are dated August 27, 1974; Mr. Quinn's comments are dated July 23, 1974; Mr. Norris' comments are dated August 7, 1974; Mr. Macbeth's comments are dated August 27, 1974.

(2)

In addition to comments concerning the Draft Permit, Con Edison has requested alternative thermal limits pursuant to Section 316(a) and has submitted data in support of its request. Comments concerning the company's 316(a) request and data submitted have been received from Dr. Jan Prager of the National Marine Water Quality Laboratory, EPA (in a letter dated December 19, 1974), Mr. Michael Ludwig of National Marine Fisheries Service, U.S. Dep't of Commerce (in a letter dated December 19, 1974) and Mr. Thomas Gallagher of National Field Investigations Center-Denver, EPA (in a memorandum dated December 18, 1974). The mailing addresses of these commenters are specified below:

1. Jan Prager, Ph.D
Assistant to the Director for Technical Operations
National Marine Water Quality Laboratory
U.S. Environmental Protection Agency
South Ferry Road
Narragansett, Rhode Island 02882
2. Mr. Michael Ludwig
U.S. Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Northeast Region
Biological Laboratory
Milford, Connecticut 06460
3. Mr. Thomas P. Gallagher, Director
National Field Investigations Center
U.S. Environmental Protection Agency
Office of Enforcement
Building 53, Box 25227, Denver Federal Center
Denver, Colorado 80225

EPA Region II has evaluated Con Edison's 316(a) submittal, other relevant information and the above comments and has determined that closed-cycle cooling is required for Indian Point Unit 2 and reduction of fish impingement is required for Unit 1. The comments concerning Section 316(a) and Region II's determinations are detailed in the memorandum, dated January 28, 1975, from Barbara Pastalove, Thomas Fikslin and Lee Clifford to the File. It should be noted that the Final Effluent Guidelines for Power Plants require closed-cycle cooling for Indian Point Unit 2, but not for Unit 1. cycle cooling for Indian Point Unit 2, but not for Unit 1.

Con Edison has requested an informal public hearing under 40 CFR 125.34 for the subject plant, at which time Con Edison would submit oral and written statements concerning (1) topics discussed in their comments in response to the Public Notices, (2) alternate best practicable effluent limitations and (3) other matters. Since it is unlikely that the major technical issues can be resolved at an informal hearing and Con Edison would probably request an adjudicatory hearing in any case, it is recommended that an informal hearing not be held. A response to each of the comments is specified below:

A. Mr. Newman's Comments

1. Comment: Many of the comments for this plant are identical or similar to comments for other Con Edison plants.

Response: Responses to these identical or similar comments are specified in the Responses to Con Edison's Comments 1,2,6,7,10,12-16 in this writer's Final Permit memorandum for the East River and Astoria 1-5 plants, dated November 26, 1974. (A copy is attached for reference).

2. Comment: With respect to Condition 2, Con Edison requests the insertion of the words "adjudicatory hearing" after "public hearing".

Response: Since it is obvious that all procedures required by law will be followed prior to modification, etc. of the permit, this request is denied. -

3. Comment: Concerning Condition 4a, Con Edison requests that all entries onto plant property be subject to plant security procedures, which are implemented in accordance with AEC regulations.

Response: It is obvious that EPA personnel will only enter after complying with such security procedures. Therefore, this condition will not be revised.

4. Comment: With respect to Condition 9b, Con Edison requests that discharge of floating solids be allowed when caused by intake screen backwash,

Response: This request is reasonable and will be reflected in the Final Permit.

5. Comment: Concerning Condition 9c(1)(a), Con Edison states that the maximum discharge temperature is 96°F if recirculation is taken into account. The company further states that various discharge-intake temperature limitations should be imposed for the various operating modes of the circulating water pumps (e.g. full flow, reduced flow, recirculation for deicing) and should take into account periods of pump outage and maintenance.

Response: The company's requests are reasonable, since they reflect present operating conditions, and will be reflected in the Final Permit.

6. Comment: With respect to New York State thermal criteria specified in Condition 9c(1)(b), Con Edison states that Section 402 of the Act allows imposition of effluent limitations to meet water quality standards but does not authorize direct imposition of such standards. The company further states that since thermal limitations in Condition 9c(1)(a) (if modified as suggested by the company) will assure compliance with the specified criteria, the imposition of such criteria is unnecessary and inappropriate.

Response: These requirements are imposed in accordance with the State 401 Certification, dated September 24, 1973, which requires the discharge from Indian Point Units 1 and 2 to be in compliance with applicable State thermal criteria. This Region cannot understand Con Edison's objections to this requirement, since (1) they state they will be in compliance and (2) it is imposed by AEC in the operating license for the plant.

7. Comment: Concerning Condition 9c(2), the company states that the intake velocity limitations should apply at a point 24" in front of the intake structure, since that was the basis for the submitted data. The company requests that such limitations be revised to (1) 1 fps at any time and (2) approximately 0.5 fps within one week after the 24-hour average site river temperature reaches below 40°F. Con Edison states that at full flow conditions the velocity is approximately 0.8 fps, which is reduced by 40% when the average site river temperature is less than 40°F.

Response: The requested point of application of the intake velocity limit is acceptable and is reflected in the Final Permit. Numerical limitations of 0.55 fps within one week after the 24-hour average site river temperature reaches 40°F or below and 0.9 fps at any time, are imposed based upon the company's data.

8. Comment: With respect to Condition 9c(3), Con Edison states that the average discharge is 30 lbs/day for Boron and 3 lbs/day for Surfactants. The company states that the permit should not include limits or monitoring requirements for radioactive effluents, since AEC has sole jurisdiction. The company also requested deletion of Conditions 9c(4) and 12(b)(2) on that basis.

Response: The company's suggested revisions concerning Boron and Surfactants will be reflected in the Final Permit. Conditions 9c(4) and 12(b)(2) will be deleted. However, limits and monitoring requirements for radioactive substances in wastewater discharges may be imposed in the future, pending final determination concerning jurisdiction over radioactive effluents.

9. Comment: Condition 9c(5) should be deleted since EPA does not have the authority to impose this condition.

Response: This requirement will be modified somewhat in the Final Permit. It should be noted that the AEC imposed a similar condition in its Operating License for Indian Point Units 1 and 2.

10. Comment: Concerning Condition 10(a)(2), Con Edison states that the chlorine limits are unnecessary since the discharge at present levels is required to maintain condenser tube cleanliness.

Response: This condition is deleted, since it has been determined that the present discharge levels are acceptable (See Condition 9b)

11. Comment: Con Edison had many comments with respect to thermal limitations and corresponding compliance schedules in Conditions 10(b), 10(c), 11(b) and 11(c). These comments are answered below.

Response: Many of Con Edison's comments are rendered moot by the promulgation of Final Effluent Guidelines for Power Plants. The Guidelines require closed-cycle cooling for Indian Point Unit 2, but not for Unit 1. The company's 316(a) request and 316(b) issues are discussed in the memorandum dated January 23, 1975, from Barbara Pastalove, Thomas Fikslin and Lee Clifford to the File. Region II's determination is that closed-cycle cooling is required for Unit 2 and reduction of fish impingement is required for Unit 1. Compliance for Unit 2 will be required by May 1, 1979, as required by AEC. However, this date may be extended (to no later than July 1, 1981) upon a showing of good cause by Con Edison. Numerical limitations, as well as the narrative condition required by the Guidelines, will be specified in the Final Permit. Such numerical limitations are based upon values which are attainable by employing cooling towers. The economics of closed-cycle cooling have already been considered in determining the Guidelines requirements.

Closed-cycle cooling is among the technical alternatives that may be imposed pursuant to Section 316(b), since this Section requires that the "capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." As per the direction of EPA attorneys in Region II and in Washington, dates of compliance after the expiration date of the permit are specified in the Final Permit. Con Edison should be aware that EPA is not bound by any previous agreements involving AEC, NYSDEC, etc. in writing the NPDES permit.

12. Comment: Con Edison requests deletion of the intake velocity limitation in Condition 10(b)(2), since closed-cycle cooling should not be required and this limitation is not necessary to carry out the provisions of Section 316(b).

Response: Closed-cycle cooling is required for Unit 2 and the company will be required to reduce fish impingement due to Unit 1. Therefore, this condition is unnecessary and will be deleted.

13. Comment: With respect to isotherm plot requirements in Condition 12(a)(2), the company states that isotherm plots are presently conducted for the AEC and NYSDEC.

Response: Similar isotherm requirements to those specified by AEC and NYSDEC will be included in the Final Permit.

14. Comment: Concerning Condition 13, Con Edison states that quarterly reporting of disposal of sludges, etc. appears sufficient. The company states that discharge of fish and non-separable solids should be permitted.

Response: The company's request is acceptable and is reflected in the Final Permit. Discharge of dead fish will not be allowed.

B Mr. Quinn's Comments - Mr. Quinn stated that the Draft Permit does not contain all of the conditions included in the 401 State Certification. He states that such conditions must be included in the NPDES permit, as required by law.

All specific conditions required by the State 401 Certification will be reflected in the Final Permit with the exception of that condition concerning the submittal of daily electrical output data. This requirement is unnecessary for the purposes of the NPDES permit, since (1) the Final Effluent Guidelines do not base limitations upon daily power generation and (2) such data is unnecessary to determine compliance with the specified limitations. It should be noted that electrical generation data can be obtained from the Federal Power Commission.

(7)

C. Mr. Morris' Comments - Mr. Morris states that closed-cycle cooling should be imposed based upon thermal impacts, impingement, entrainment and cumulative impact.

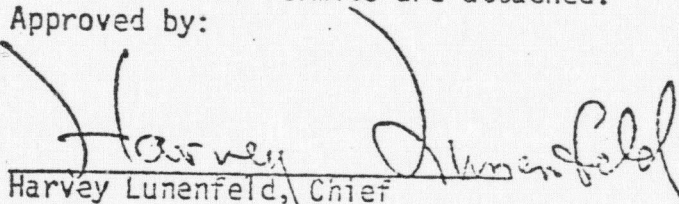
The Final Effluent Guidelines for Power Plants requires closed-cycle cooling for Unit 1, but not for Unit 2. Upon review of the company's Section 316(a) data submittal, other relevant information and various comments concerning the submittal, Region II has determined that closed-cycle cooling should, in fact, be required for Unit 2 and reduction of fish impingement should be required for Unit 1. The various 316(a) and 316(b) issues are discussed in the memorandum, dated January 28, 1975, from Barbara Pastalove, Thomas Fikslin and Lee Clifford to the File.

D. Mr. Macbeth's Comments - Mr. Macbeth agrees with the Draft Permit requirement of closed-cycle cooling for both Units 1 and 2, based upon thermal impact, impingement, entrainment and cumulative impact.

The Final Effluent Guidelines for Power Plants requires closed-cycle cooling for Unit 1, but not for Unit 2. Upon review of the company's Section 316(a) data submittal, other relevant information and various comments concerning the submittal, Region II has determined that closed-cycle cooling should, in fact, be required for Unit 2 and reduction of fish impingement should be required for Unit 1. The various 316(a) and 316(b) issues are discussed in the memorandum, dated January 28, 1975, from Barbara Pastalove, Thomas Fikslin and Lee Clifford to the File.

The Final Permits are attached.

Approved by:


Harvey Lunenfeld, Chief
Energy and Thermal Wastes Section
Industrial Water Facilities Branch

Consolidated Edison Company of New York, Inc.
4 Irving Place, New York, N. Y. 10003
Telephone (212) 460-5133

August 27, 1974

James A. Sellar, Chief
Permits Administration Branch
Enforcement and Regional Counsel Division
Region II
U.S. Environmental Protection Agency
26 Federal Plaza
New York, New York 10007

Re: Application No. 2SD OXW 2 000031 (NY 0004472)
Consolidated Edison Company of New York, Inc.
Indian Point Generating Station, Units 1 and 2

Dear Mr. Sellar:

As required by Public Notice No. NPDES 74-1111, dated June 28, 1974, Consolidated Edison hereby submits its Comments on Public Notice No. NPDES 74-1111 dated June 28, 1974 and Draft NPDES Permit for Indian Point Generating Station, Units 1 and 2.

Consolidated Edison hereby requests a Public Hearing pursuant to 40 C.F.R. § 125.34 with respect to the tentative determinations contained in the draft permit for Indian Point Units 1 and 2.

In the enclosed comments, Con Edison sets forth its general and specific objections to the proposed conditions set forth in the draft permit transmitted by EPA. In particular, Con Edison objects to those proposed limitations which would require the imposition of closed-cycle cooling for Indian Point 1 and Indian Point 2. Those stringent limitations have been imposed without considering or balancing the total costs and benefits of the proposed limitations as required by the Federal Water Pollution Control Act.

The monetary costs alone for constructing and operating a closed-cycle cooling system at Indian Point 1 and 2 are enormous. The total estimated cost is approximately 87 million dollars. The present worth value of the incremental generating cost for closed-cycle cooling at Indian Point 1 and

2 is approximately 353 million dollars. This is computed to be a levelized amount of approximately 55 million dollars each year during the life of the plants. To impose costs of such magnitude on the customers of Con Edison for actions which are not only unnecessary to protect the environment but indeed may have a negative impact on the environment is wrong.

Consideration must also be given to the impact of EPA's proposals on the inflationary pressures which the President of the United States has recently designated as the No. 1 national priority. These proposals necessarily lead to an increase in electric rates which adds to inflationary pressures. To impose such unnecessary costs for actions which will decrease the reliability and availability of electricity particularly in view of the increasing national concern about the economy is contrary to the public interest.

The unreasonableness of EPA's actions is underscored by the recent proceedings before the United States Atomic Energy Commission regarding the issuance of an operating license for Indian Point 2. (Consolidated Edison Co., Indian Point Station, Unit No. 2, AEC Docket No. 50-247.) That contested proceeding before the AEC -- in which the Attorney General of the State of New York, the New York State Atomic Energy Council and several environmental organizations participated in addition to the Atomic Energy Commission's Regulatory Staff and Con Edison -- included an extensive consideration of the environmental and economic benefits and costs resulting from the operation of Indian Point 2 both with its presently designed once-through cooling system and with an alternative closed-cycle cooling system. Approximately one hundred and twenty-five separate pieces of written testimony regarding environmental matters and totalling more than 3,000 pages were received in evidence and incorporated in the transcript of the AEC proceeding. In addition the transcript of the AEC environmental hearing consists of more than 5,000 pages as well as an additional number of evidentiary exhibits.

On the basis of the entire evidentiary record, the Atomic Energy Commission did impose a tentative schedule for the construction and operation of a closed-cycle cooling system for Indian Point 2. But the schedule imposed requires the cessation of once-through cooling on May 1, 1979 in order to

operate with a closed-cycle system by December 1, 1979 rather than July 1, 1978 as required by EPA in its draft permit. The AEC schedule also provides an opportunity for the consideration of additional environmental impact data expected from the ecological research program which Con Edison is now conducting so that an informed final decision on the permanent cooling system can be made. Moreover, it is apparent that on the basis of the impact from thermal discharges alone, the AEC would not have fixed even a tentative schedule for the construction of a closed-cycle cooling system at Indian Point 2.

We are attaching to this letter the decision of the Atomic Safety and Licensing Appeal Board regarding environmental matters in the Indian Point 2 operating license proceeding. The decision and the extensive record from the AEC proceeding are discussed in our comments on the draft permit. We are confident that EPA will follow those portions of the AEC decision and record which relate to the subjects for consideration under the provisions of the Federal Water Pollution Control Act, in order to avoid conflicts with the AEC determination as well as to avoid needless duplication.

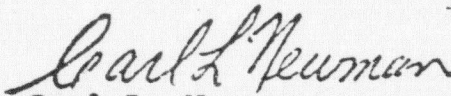
The attached comments are submitted without prejudice to Con Edison's rights to contest the propriety or validity of (a) any or all of the proposed effluent limitations and guidelines for steam electric power plants, (b) such limitations and guidelines as they may be later made effective or (c) any and all conditions of the draft permit on grounds other than those stated in the attached comments.

All correspondence in connection with the referenced application should be addressed to the undersigned at Consolidated Edison Company of New York, Inc., Four Irving Place, New York, New York 10003, with copies to:

Arvin E. Upton, Esq.
LeBoeuf, Lamb, Leiby and MacRae
1757 N Street, N.W.
Washington, D.C. 20036

Please acknowledge receipt of this letter.

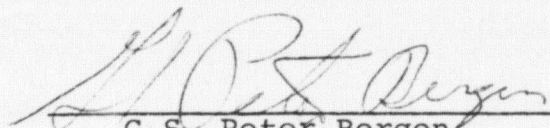
Very truly yours,


Carl L. Newman

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served by hand upon each of the parties to this proceeding two copies of the foregoing Reply Brief of Appellants-Petitioners.


G.S. Peter Bergen

Dated: April 28, 1978